IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 64

ROBERT SWAIN,

*Petitioner,*

—v.—

ALABAMA,

*Respondent.*

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR REHEARING

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## INDEX TO BRIEF

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The American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in support of the petition for rehearing in this case. The attorney for petitioner has consented to the filing; the respondent's attorney has denied consent. Their letters have been filed with the Clerk of the Court.

The American Civil Liberties Union has been engaged for forty-five years in the national effort to secure the application of the Bill of Rights and the Reconstruction Amendments to all persons within the jurisdiction of the United States. Its work has laid special emphasis on the procedural rights protected by the due process clause of the Fourteenth Amendment and on the substantive rights protected by that Amendment's equal protection clause.

In the case at bar, the due process and equal protection clauses intersect. What is at stake is the right of a defen-

dant to receive the benefits of a fair trial regardless of the color of his skin. It is perhaps the ultimate right, for it involves the method by which a state may enforce its power to deprive a man of his physical liberty or, as in this case, of life itself.

In recent years the ACLU has engaged in special efforts to insure that Negroes in the Southern states become the beneficiaries of a fairly administered system of criminal justice. All the world knows that Negroes now are the victims of a distorted system of justice. Their second-class citizenship does not end at the steps of the court-house; it goes inside with them. *Johnson* v. *Virginia*, 373 U. S. 61 (1963); *Hamilton* v. *Alabama*, 376 U. S. 650 (1964); *Louisiana* v. *United States*, 33 U. S. L. Week 4262 (U. S. March 8, 1965).

The ACLU is involved today in no less than a dozen cases in Mississippi, Louisiana, Alabama, Georgia, and Florida, which challenge the systematic exclusion of Negroes from jury service in those states. The Union believes that those cases, in conjunction with the related efforts of other organizations and attorneys, promise to affect substantially the illegal tribunals which, though condemned by the Constitution, nonetheless sit in judgment on men's liberty. The Court's opinion in *Swain* v. *Alabama*, however, threatens to extinguish that promise. It is, in our opinion, an emphatic contradiction of the Court's earlier expressions of special responsibility for the fair administration of criminal justice.

In order to inform the Court of our views, we respectfully ask leave to file the attached brief.

Respectfully submitted,

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### Argument

The brazen fact in this case is that in Talladega County, Alabama, where the population consists of 20,970 Negroes and 44,425 whites, no Negro has served on a petit jury at least since 1950.

The petitioner made two claims: first, that "Negroes are unconstitutionally excluded from jury service in that the State always strikes the token number of Negroes on the trial venires with the result that Negroes never serve on trial juries"; and, second, that "Negroes have been summoned for jury service in only token numbers and the State has offered no explanation of the small proportion called." The Court rejected both claims. We shall confine our brief to the second claim. We support the first, to be sure, but for brevity's sake leave its discussion to petitioner's able attorneys.

The evidence showed that though Negroes eligible for jury service (males over 21) constituted 26% of the total eligible population, only 10 to 15% of the names drawn from the box had been Negroes.[1] The majority concluded, therefore, that "Alabama has not totally excluded a racial group from either grand or petit jury panels," that "an average of six to eight Negroes on these panels [does not constitute] forbidden token inclusion," and that "the evidence in this case [does not] make out a prima facie case of invidious discrimination" (Slip Opinion, pp. 3-4). Furthermore, the opinion said that "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as 10%" (Slip Opinion, p. 6).

We believe that the interpretation of the prima facie rule adopted implicitly in the Court's opinion is unworkable and calls a dead halt to the improvement of the administration of justice in the Southern states.

Of all the areas of law with which this Court has dealt, there is none which has more consistently evoked uniform disposition than cases dealing with the systematic exclusion of Negroes from service upon juries. Though the Court has refused to tolerate the practice from *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), to *Arnold* v. *North Carolina*, 376 U. S. 773 (1964), it has persisted nonetheless. See, e.g., *U. S. ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71 (C. A. 5, 1959), *cert. den.* 361 U. S. 838 (1959) (Mississippi); *U. S. ex rel. Seals* v. *Wiman*, 304 F. 2d 53 (C. A. 5, 1962), *cert. den.* 372 U. S. 924 (1963) (Alabama); *In The Matter of Newton*, 224 F. Supp. 330 (D. C. W. D. La., 1963) (Louisiana); *Whitus* v. *Balkcom*, 333 F. 2d 496 (C. A. 5,

[1] The range was actually 4 to 23%. The average was 10 to 15%. The 23% occasion was extraordinary. Petitioner's brief, p. 19.

1964), *cert. den.* 33 U. S. L. Week 3209 (U. S. Dec. 7, 1964) (Georgia). See too, U. S. Commission on Civil Rights, 1961 Report, Book 5, Chapter 7.

We suggest that the explanation for that persistence lies in the nature of the cases the Court has decided as contrasted to the case at bar. That is to say, the Court's decisions, with one exception,[2] have been confined to such plainly outrageous situations, that it has been child's play to comply with their language but to ignore their substance. A brief look at the circumstances of the earlier cases will make our point plain.

1. *Strauder* v. *West Virginia, supra.* A state statute limited jury service to whites.

2. *Neal* v. *Delaware,* 103 U. S. 370 (1880).
   White population: 124,000
   Negro population: 26,000
   Negroes called for jury service: *None.*

3. *Bush* v. *Kentucky,* 107 U. S. 110 (1882). A state statute limited jury service to whites.

4. *Norris* v. *Alabama,* 294 U. S. 587 (1935).

   *Jackson County*
   White population: 36,881
   Negro population: 2,688
   White eligibles: 8,801
   Negro eligibles: 666
   Negroes called for jury service: *None* within memory.

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[2] The exception is *Brown* v. *Allen,* 344 U. S. 443 (1953). But for the *Swain* opinion, we would have thought *Brown* v. *Allen* was now a constitutional derelict. Whether it is or not, will be clarified by reargument in the case at bar.

*Morgan County*

Total population: 46,176
Negro population: 8,311
Negroes called for jury service: *None* within memory.

5. *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935).
Total population: 56,200
Negro population: 9,554
Negroes called for jury service: *None.*

6. *Hale* v. *Kentucky*, 303 U. S. 613 (1938).
Total population: 48,000
Negro population: 8,000
White eligibles: 6,000
Negro eligibles: 1,700
Negroes called for jury service: *None* for 30 years.

7. *Pierre* v. *Louisiana*, 306 U. S. 354 (1939).
White population: 49.7%
Negro population: 49.3%
Negroes called for jury service: *One* within memory.

8. *Smith* v. *Texas*, 311 U. S. 128 (1940).
White population: 80%
Negro population: 20%
White eligibles: 90%
Negro eligibles: 10%
Negroes called for jury service: *18* out of 512 over seven-year period.

9. *Hill* v. *Texas*, 316 U. S. 400 (1942).
White eligibles: 58,000
Negro eligibles: 8,000
Negroes called for jury service: *None* for at least past 16 years.

10. *Patton* v. *Mississippi*, 332 U. S. 464 (1947).
White population: 22,310
Negro population: 12,511
White eligibles: 5,500
Negro eligibles: 25
Negroes called for jury service: *Two or three* over past 30 years.

11. *Cassel* v. *Texas*, 339 U. S. 282 (1950).
White population: 336,959
Negro population: 61,605
White eligibles: 7,167
Negro eligibles: 5,500
Negro service on grand jury: *One* on each of 21 consecutive jury over 6-year period.

12. *Hernandez* v. *Texas*, 347 U. S. 475.
Non-Mexican population: 86%
Mexican population: 14%
Mexicans' service on juries: *None* for 25 years.

13. *Reece* v. *Georgia*, 350 U. S. 85 (1955).
White population: 55,606
Negro population: 6,224
White eligibles: 16,201
Negro eligibles: 1,710
Negroes called for grand jury service: *Six* in 18 years.

14. *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958).
White population: 66 2/3%
Negro population: 33 1/3%
Negro service on grand juries: *One* in 18 years.

15. *Arnold* v. *North Carolina*, 376 U. S. 773 (1964).
White eligibles: 5,583
Negro eligibles: 2,499
Negro service on grand juries: *One* in 24 years.

In fact, then, all the earlier cases, except *Brown* v. *Allen*, *supra*, indisputably involved mere token inclusion.[3] Nonetheless, the language of the earlier cases stated the prima facie rule so positively that attorneys have relied upon it with more than good reason. The language is so uniform, consistent, and forcefully expressed, that skepticism would have been a waste of energy. But that reliance turns out to have in fact been foolhardy, because the Court now says, without warning, that a defendant does not show purposeful discrimination even when one-half of the eligible Negroes in a county have not been called for jury service, when their exclusion is unexplained, and when no Negro has served on a petit jury for 15 years.

It is relevant to point out here the fallacy of Mr. Justice White's statement that the record in this case showed that Negroes were "under-represented by as much as 10%" (Slip Opinion, p. 6). As phrased, the disparity appears relatively minor.[4] Actually, the statement is seriously misleading, because Negroes in Talladega County were under-represented not by 10% but by 50%. What Mr. Justice White meant to say was that Negroes were under-represented by 10 *percentage points*, which is quite a different thing. His 10% presumably refers to the difference be-

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[3] *Avery* v. *Georgia*, 345 U. S. 559 (1953), involved more than token inclusion but it was decided on another ground. However, Mr. Justice Reed in his concurrence concluded that a prima facie case was made out by a showing that a jury list contained 5% Negro names where Negroes composed 14% of the eligible jurors, that is, where Negroes were under-represented by only 9% compared to the 10% under-representation deemed insufficient in *Swain* to show prima facie exclusion. But see our discussion of that 10% calculation which follows.

[4] Indeed, Mr. Justice White says, "The over-all percentage disparity has been small . . ." (Slip Opinion, p. 6).

tween the 26% figure which represents eligible Negroes and the 10-15% figure which represents the number of Negro names drawn from the box. But in absolute numbers, 26% equals 4,281 [Petitioner's brief, p. 3], and 10 to 15% equals 1,640 to 2,460. Consequently, Negroes were under-represented not by 10%, but by from 66.4% to 42.6%, an average of 54.5%.[5]

The practical issue confronting attorneys in systematic exclusion cases is to determine the point at which the state has the burden of explaining the disparity between the number of Negroes in a county and the number who have been called or who have served on juries. Common sense should inform us how to allocate that burden.

If the defense shows that Negroes are under-represented by 50% on the jury lists and totally unrepresented on petit juries, the defense knows as well as the state officers that the explanation is local segregation policy.[6] Who then ought have the burden of trying to explain it? The answer seems fairly obvious: those who are responsible for administering the judicial system—the state officials. The Negroes not called for jury service in Talladega County cannot explain why they are not called except to say that they are Negroes. That is the real reason, but it is not a reason the state can offer because it is an unconstitutional reason. If the state officials have a better reason, let

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[5] In 1953, Mr. Justice Black thought that the presence of 4-7 Negroes in each jury venire of 44 to 60, where Negroes composed one-third of the county's population, was "glaringly disproportionate." *Brown* v. *Allen*, 344 U. S. 443, 550 (dissent).

[6] "We start with a *fair inference*. If the segregation policy in a county is so strong that Negroes are systematically excluded from the jury system, community hostility would be generated against any 'trouble-maker' who would attempt to upset the all-white make-up of the jury system." *Whitus* v. *Balkcom*, *supra* at 506.

them produce it. Given the opportunity in this case, the state had the audacity to speak of syphilis, gonorrhea, illegitimacy and the receipt of public assistance. The real reasons, as the Fifth Circuit said in *Goldsby* v. *Harpole*, "rest more in the knowledge of the State." 263 F. 2d at 78. And the real reasons, we daresay, are constitutionally untenable.

Let us consider Mississippi for a moment, where jury service is restricted to "qualified electors." Miss. Code, §1762. In *Harper* v. *Mississippi*, —— Miss. ——, —— So. 2d —— (1965), the Mississippi Supreme Court reversed a conviction because of systematic exclusion. The county involved had a total population of 21,139, 8,089 of whom were Negroes. 24 Negroes were qualified electors compared to 5,172 whites. The record showed without dispute that for ten years the number of Negroes called for jury service were as follows: 1963—1; 1962—1; 1961—1; 1960—0; 1959—0; 1958—0; 1957—2; 1956—1; 1955—2; 1954—0. The Mississippi Supreme Court said "long continued omission of Negroes from jury service establishes a prima facie case of systematic discrimination. The burden of proof is then upon the State to refute it."

At some future time, perhaps 26% of the Negroes in that county will be registered voters. If they are called for jury service at the rate of 10-16%, will this Court say that the burden is on a defendant to prove that Negroes are qualified to vote, a procedural challenge which even the United States Government is unable to overcome. "The federal government has demonstrated a seeming inability to make significant advances, in seven years' time, since the 1957 law, in making the right to vote real for Negroes in Mississippi, large parts of Alabama, and Louisiana, and in scattered counties in other states." Burke Marshall, *Federalism and Civil Rights* (Columbia Univ. 1964) p. 37.

There was some progress being made in the hard job of whittling away at jury discrimination in the South before *Swain* came down. Now that progress is seriously threatened. If the promise of the equal protection clause is ever to be realized in the administration of criminal justice, the burden of disproving discrimination must rest on the state at least until the disparity between Negro population and Negro jury service is insignificant. That is the issue which the Court must reconsider in this case.

Both the state courts and the Fifth Circuit look here for guidance. If this Court will tolerate the 50% disparity in *Swain*, those courts will hardly require a more stringent test.

The Mississippi Supreme Court in *Harper* v. *Mississippi*, *supra*, closed its opinion with these words:

> "We recognize that in some counties compliance with these constitutional requirements may present difficulties, but they must be surmounted if the criminal laws are to be effectively administered. The United States Constitution does not require proportional representation of the races on a jury, or even that members of a particular race must be on a particular jury. As a practical matter, what is required is that the county officials must see to it that jurors are in fact and in good faith selected without regard to race."

That is very strong language for that court. It is not speculative to say that the Mississippi Supreme Court was persuaded that of all the racial issues that come before this Court, there was no expectation that its strong stance on jury exclusion would be qualified in any way.[7] But there

[7] In the only other case in recent years in which the Mississippi Supreme Court reversed because of jury exclusion, it did so because it would have been "a vain and futile thing" to allow it to be reviewed by this Court. *Gordon* v. *Mississippi*, 243 Miss. 750, 140 So. 2d 88 (1962).

is hope now for those who would flout the constitutional command. They can and will interpret *Swain* to mean that juries selected without regard to race are not constitutionally sacrosanct after all.

In this time of rising expectations, the insistence upon strict constitutional compliance in the administration of justice is the foundation upon which all else rests. Of what use is the right to vote, the right to enjoy public accommodations, the right to a decent education, and the right to employment without discrimination, if a man is sent to jail or to his death by a jury from which a whole class of citizens is effectively excluded?

## CONCLUSION

**For the reasons stated above, the Court should order this case set down for reargument.**

Respectfully submitted,

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